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No. 82-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

MOTION OF SENATOR MARK O. HATFIELD, SENATOR PAUL LAXALT, SENATOR JENNINGS RANDOLPH, SENATOR JAKE GARN, SENATOR PETE V. DOMENICI, SENATOR JEREMIAH DENTON, SENATOR DONALD L. NICKLES, SENATOR SLADE GORTON, SENATOR JESSE A. HELMS, SENATOR S. I. HAYAKAWA, SENATOR JAMES ABDNOR, SENATOR DAVID L. BOREN, SENATOR DENNIS DeCONCINI, SENATOR WILLIAM PROXMIRE, SENATOR ALAN K. SIMPSON, SENATOR ORRIN G. HATCH, SENATOR ROGER W. JEPSEN, SENATOR PAULA HAWKINS, SENATOR WILLIAM L. ARMSTRONG, SENATOR SAM NUNN, SENATOR ROBERT J. DOLE, SENATOR MAX S. BAUCUS, SENATOR HOWELL HEFLIN, AND SENATOR J. BENNETT JOHNSTON, MEMBERS OF THE UNITED STATES CONGRESS, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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United States Senators Mark O. Hatfield, Paul Laxalt, Jennings Randolph, Jake Garn, Pete V. Domenici, Jeremiah Denton, Donald L. Nickles, Slade Gorton, Jesse A.

Helms, S.I. Hayakawa, James Abdnor, David L. Boren, Dennis DeConcini, William Proxmire, Alan K. Simpson, Orrin G. Hatch, Roger W. Jepsen, Paula Hawkins, William L. Armstrong, Sam Nunn, Robert J. Dole, Max S. Baucus, Howell Heflin, and J. Bennett Johnston, respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*. Respondent, Lubbock Civil Liberties Union, has refused to consent to the filing of this brief.

Movants' interest in this case arises from their responsibilities as Members of the United States Senate. Each is sworn to support and defend the Constitution of the United States. As described in the accompanying brief, the Senate presently has pending before it proposed constitutional amendments and legislation concerning school prayer, including legislation designed to remove voluntary school prayer cases involving state laws from the jurisdiction of the federal courts. Thus, movants have a substantial official interest in the resolution of the issue presented in this case.

The proposals pending in the Senate are the result of the widespread perception that the lower federal courts, including the Fifth Circuit in the instant case, are interpreting the Constitution in a way that is hostile to religion. As this Court has recognized repeatedly, the Constitution requires state neutrality, not state hostility, toward religion. School boards around the country are in turmoil and confusion about whether they may treat religious activities neutrally, or whether they now must monitor student actions and prohibit voluntary student speech and association with apparent religious content.

The ruling of the court below fails to follow this Court's mandate of neutrality. It has increased the national confusion as to the law and concern as to the attitude of the judiciary toward religion. The question presented in this case should be resolved quickly by the Court in favor of neutrality by granting *certiorari* in this case and reversing the decision of the Fifth Circuit panel.

As representatives of our constituents, and as legislators who must act on this issue in our official capacities, we submit that we are in a unique position to demonstrate to the Court the importance of this issue to the people of this country and the extent to which our constituents are confused by the conflicting interpretations of the Constitution given by the courts on the subject of school prayer. *See, e.g., National Organization for Women, Inc. v. Idaho*, 455 U.S. 918 (1982) (Motions of Senator Jake Garn, *et al.*, and Congressman Thomas P. O'Neill, Jr., *et al.*, for leave to file briefs as *amici curiae* granted). Thus, these Senators request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are elected members of the United States Senate. Each has taken an oath to support and defend the Constitution of the United States. Each serves

at the will of and as the representative of the citizens of one of the several States. Each bears the responsibility of voting upon legislation designed to preserve and protect rights guaranteed by the Constitution of the United States.

Amici do not lightly seek leave to appear before this Court. However, the decision below would require a school board to discriminate against students who wish to use school facilities outside school hours for discussion the school board considers to have religious content. We submit that the decision violates fundamental principles of the First Amendment. The decision treats one of the most divisive social issues of our day. It is an issue involving the deepest convictions and most cherished liberties of the American people.

The issue presented is one that we have been asked to address officially on several recent occasions and one which we will have to address again. The United States Senate has before it constitutional amendments to permit prayer in public schools,[1] legislation to permit prayer in public schools to some degree,[2] and legislation to remove

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[1] S.J. Res. 199, 97th Cong., 2d Sess. (1982), a constitutional amendment proposed by President Ronald Reagan and sponsored by Senators Thurmond and Hatch declares that "Nothing in the Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." An alternative constitutional amendment proposed by Senator Byrd is similar in nature. S.J. Res. 247, 97th Cong., 2d Sess. (1982).

[2] Title IV of S.1378, 97th Cong., 1st Sess. (1981) and S.1577, 97th Cong., 1st Sess. (1981), introduced by Senator Jepsen, would grant every individual the right to participate in voluntary prayer or religious meditation in any public building and would forbid the State from abridging that right. S.2928, 97th Cong., 2d Sess. (1982), introduced by Senator Hatfield, would require public secondary schools that receive federal aid and which generally allow students to meet during non-instructional periods also to permit use of school facilities on an equal basis by students meeting voluntarily for the purpose of religious discussion or prayer.

voluntary school prayer cases arising under state law from the jurisdiction of the federal courts.[3]

The proposals before the Senate are responsive to the widespread perception that the courts are interpreting the Constitution in a way that is hostile to religion. We are of the firm conviction that the decision below is just such a decision and that, if allowed to stand, it will place the judiciary at odds with the people it serves and the Constitution it interprets. The Constitution is not hostile to religion and the prior decisions of this Court do not compel the holding below that it is. Rather, the overwhelming weight of this Court's prior decisions establishes that the Constitution requires the government to maintain *neutrality* toward religion in a way that recognizes and protects the liberties of our students. The holding below improperly requires state hostility to religion and infringes student rights.

This case presents the Court with the opportunity to resolve an issue of unusual importance that is causing widespread confusion and confrontation. Numerous school boards throughout the country are uncertain as to the applicable law on the subject of equal access to school facilities by voluntary student groups.[4] Some, relying on this Court's recent decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), applicable to colleges, believe they must permit voluntary religious activities that are initiated and run by students when they make their facilities available for nonreligious

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[3] S.481, 97th Cong., 1st Sess. (1981), and S.1742, 97th Cong., 1st Sess. (1981), introduced by Senator Helms, would eliminate Supreme Court and federal district court jurisdiction to review and hear any case arising under state law relating to voluntary prayer in public buildings and schools.

[4] *See, e.g.*, 128 Cong. Rec. S11780-86 (daily ed. Sept. 17, 1982). The present confusion is discussed in more detail, *infra*, at 9.

activities. Others, relying on the decision below,[5] believe they are prohibited from doing so. Still others believe that the discretion whether to permit such activities rests with the school boards. A clear rule on this issue is urgently needed. This case squarely presents the Court with the opportunity to announce such a rule.

Amici believe that neither legislation nor a constitutional amendment is required to permit a school to open its facilities for all appropriate student-initiated and student-managed activities including, if the students wish, religious activities. The Constitution already so provides. The Establishment, Free Exercise and Free Speech Clauses of the First Amendment require treatment of such activities in a neutral manner. Consequently, public schools properly may allow students equal access to school facilities for voluntary, extracurricular, religious speech and assembly.

Supreme Court reaffirmation of this neutrality principle will assist *amici* in acquitting their responsibilities as elected officials when acting upon pending legislation and constitutional amendments and when providing guidance to constituents who operate or attend public schools. These *amici curiae* have a substantial official interest in the issue presented in this case, and urge the Court to grant the petition for *certiorari* and to reverse the decision of the Fifth Circuit.

STATEMENT OF THE CASE

On August 26, 1980, the Lubbock Independent School District adopted a policy concerning the use of school facilities during non-instructional periods that provided equal access to voluntary, supervised, student groups for

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[5] The Fifth Circuit decision, reported at 669 F.2d 1038 (5th Cir. 1982), is reprinted as Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed November 12, 1982 ("Petition for Certiorari").

any "educational, moral, religious or ethical purposes."[6] It is neutral on its face. Paragraph four of the policy states:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

The Lubbock Civil Liberties Union challenged this policy under the Establishment Clause of the First Amendment as unconstitutional on its face and as applied.[7]

The District Court held that the equal access policy was not facially unconstitutional. Rather, it "strikes the correct balance between the First Amendment's mandate against governmental establishment of a religion and

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[6] Since this case clearly involves the question whether public school facilities already available to other student groups may be made available on an equal basis to voluntary student groups seeking to engage in religious discussion or prayer, it differs from *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), as that case was presented to this Court.

At the time the decision was rendered in *Widmar v. Vincent*, *supra*, 102 S. Ct. 269, and thus at the time of the denial of *certiorari* in *Brandon*, the Court described *Brandon* as a case "in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause." 102 S. Ct. at 276 n.13 (emphasis in original). The Court subsequently eliminated the reference to *Brandon* in footnote 13 of the *Widmar* decision, *see Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981).

[7] At trial, however, the president of the Lubbock Civil Liberties Union, a professor of constitutional law, testified that the policy was not facially unconstitutional (Tr., at 28) and that despite widespread publicity concerning the litigation respondent had received no complaints concerning the policy as applied. (Tr. at 27-28.)

its protection of the free exercise of religion." [8] The District Court also found that there was no evidence that the policy had been unconstitutionally applied.[9]

The Fifth Circuit Court of Appeals reversed this decision, finding that the School Board's equal-access-to-facilities policy was an unconstitutional establishment of religion. *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982). The Circuit Court held that the policy was constitutionally objectionable because it "appear[ed] in the middle of a policy concerned with religious activities in the schools," [10] because it authorized student meetings "at a time closely associated with the school day" [11] thereby demonstrating "implicit support and approval of the religious meetings," [12] and because the School District, in connection with its statutory responsibilities concerning school property, intended to provide personnel to ensure the protection of school property during the student meetings.[13]

Rehearing *en banc* was denied, with four judges dissenting.[14] The dissenting judges asked: "Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief?" [15] This Court should resolve that question in favor of neutrality, by

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[8] The District Court's unpublished opinion is reprinted as Appendix B to the Petition for Certiorari. The quoted statement is found at page 31a of the Appendix.

[9] Petition for Certiorari, Appendix B, at 33a.

[10] Petition for Certiorari, Appendix A, at 13a.

[11] *Id.*, at 16a.

[12] *Id.*, at 17a.

[13] *Id.*, at 18a-20a.

[14] *See* Petition for Certiorari, Appendix D.

[15] *Id.*, at 41a.

granting petitioner's writ, and by reversing the Fifth Circuit decision.

SUMMARY OF ARGUMENT

The question of whether a school board may open public school facilities to a broad range of student-initiated activities including religious activities or whether the school board must discriminate against activities it considers religious is one which the Supreme Court should resolve now. The Court left this question open in *Widmar v. Vincent, supra*, 454 U.S. at 274 n.14. The holding in *Widmar* and the neutrality principle it espouses point powerfully in one direction. The holding below points in the other. School boards do not know what the law is on a question of great importance to their communities. The Court should eliminate this confusion by announcing a clear equal access rule that can be applied by school authorities nationwide.

This case presents the issue clearly. The policy of the School Board is set forth in writing and has been struck down as unconstitutional on its face. *Certiorari* should be granted because the Fifth Circuit decision conflicts with the settled principle that neutral State policies concerning religion are not unconstitutional, and because the Fifth Circuit decision requires a deviation from such neutral policies that deprives students of their rights of Free Speech and Assembly.

ARGUMENT

Reasons for Granting the Writ

I. This Court Should Grant the Writ to Reduce the Nationwide Confusion Concerning Proper Policies for Religious Activities in Public Schools

Many school boards across the country, genuinely wishing to comply with this Court's rulings, have struggled to resolve the issue of whether students may meet volun-

tarily for religious purposes. Some school authorities have concluded that such meetings cannot be permitted while others, interpreting the same conflicting legal precedents, have reached the opposite conclusion. For example:

—In Sonoma, California, a group of high school students who had been meeting to discuss religious topics was recently disbanded by the school's principal after nearly ten years as a recognized student group. The school district's legal counsel, after reviewing this Court's decision in *Widmar* and the Fifth Circuit's decision in the instant case, advised the principal that *Lubbock* controlled in the high school setting and thus prohibited the group's activities.

—In Anderson County, South Carolina, students have been meeting weekly in school facilities for the past two years before school buses arrived for prayer, Bible study and religious discussions. The students have met on school premises pursuant to a written policy applying to non-student groups allowing use of the school facilities "to promote the general cultural, civic, religious, educational and social welfare of the community." The policy was clarified in November 1982 to make explicit that religious activity is not permitted during the school day. The group may continue to meet under this policy. The local affiliate of the American Civil Liberties Union has threatened to sue the school board if the religious activities continue.

—In Williamsport, Pennsylvania, high school students have sought recognition as a school club for prayer, Bible study, and discussion, and have asked permission to meet on the school premises during the early morning student activity period. Other student groups regularly meet during this activity period. The students' request has been denied based on the opinion of the school district's attorney that recognition of the group would violate the First Amendment. On June 2, 1982, the students filed a

complaint against the school board in federal court seeking a declaration that the refusal to permit the students to meet violates their First Amendment rights.

—In Saddleback, California, a written school policy permitted student groups to meet to discuss issues without regard to content and subject matter. The policy distinguished between sponsored clubs, which received financial support and supervision from the school, and student-initiated groups, which received no such support. A student-initiated group met during the school lunch period to discuss topical issues and read passages from the Bible. The American Civil Liberties Union filed suit against the school board, asking that the policy, as applied, be declared unconstitutional. The suit was dropped when a newly elected school board promulgated a new policy that allows only sponsored clubs.

These examples illustrate the prevailing confusion as local authorities attempt to operate the schools in the face of conflicts between the cases decided by this Court and the lower federal courts. The Court should grant petitioners' writ to resolve this issue by announcing a clear rule for the nation permitting equal access to school facilities.

II. This Court Should Grant the Writ to Uphold the Principle of Neutrality

The Lubbock School Board has formulated a neutral, non-preferential policy that allows equal access to school facilities for all types of student groups wishing to meet. The policy "neither advances nor inhibits religion." *See Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Merely allowing students to meet for prayer and religious discussions, pursuant to a policy allowing students to meet for a broad variety of purposes, is consistent with this Court's long-established requirement that States act in a manner neutral toward religious and non-

religious activities. This principle was first articulated by this Court, through Mr. Justice Black, in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947):

> [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

In fact, this Court has consistently required governmental neutrality toward religion. *See Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." [footnote omitted]); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."); [16] *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) ("Short of those expressly proscribed governmental acts [governmentally established religion or governmental interference with religion] there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) ("The attitude

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[16] The Court in *Lemon* described the types of neutral facilities and services that school districts can provide:

> Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.

403 U.S. at 616-17. *See also Board of Education v. Allen*, 392 U.S. 236 (1968). The classrooms made available in the present case on an equal basis to all student groups are also neutral facilities.

of government toward religion must, as this Court has frequently observed, be one of neutrality."); *Abington School District v. Schempp*, 374 U.S. 203, 215, 218, 222, 225, 299, 306 (1963); *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.").

The equal access policy instituted by the Lubbock School District satisfies the requirement of neutrality. As this Court stated in *Widmar*, a non-preferential policy permitting all student groups to have equal access to university facilities reflects a secular purpose, 454 U.S. at 271-72, and "[t]he provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect," *id.* at 274. By contrast, the Fifth Circuit's decision in *Lubbock* violates the neutrality principle by requiring the State to become the adversary of public school students who wish to engage in religious activities. Under *Lubbock*, school boards would be required to screen all voluntary groups that are meeting or desire to meet and deny equal access to school facilities when religious content is discovered. Such State involvement is precisely the sort of entanglement that this Court's rulings under the Establishment Clause have sought to prevent. *Widmar v. Vincent, supra*, 454 U.S. at 269, n.6.

III. This Court Should Grant the Writ to Protect Students' Rights of Free Speech and Assembly

This Court has emphatically stated that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Religious discussion and worship are "forms of speech and association pro-

tected by the First Amendment." *Widmar v. Vincent*, *supra*, 454 U.S. at 269. Consequently, students must be permitted to exercise their Free Speech and Association rights, including the right to engage in speech with religious content, unless the conduct "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .' " *Tinker*, *supra*, 393 U.S. at 509, *citing Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). In the instant case there is no indication whatsoever that voluntary meetings outside school hours would disrupt discipline in the school.

Furthermore, this Court has held that where the facilities of a public university are made generally available to students for the exercise of their rights of speech and assembly, they cannot be denied to other students who wish to engage in religious speech and assembly. *Widmar v. Vincent*, *supra*, 454 U.S. 263. The Lubbock School District permits other voluntary student groups to use school facilities. It should also be permitted to allow religious-oriented groups to meet. Indeed, as held in *Tinker*, "the prohibition of expression of *one particular opinion*, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511 (emphasis added). Since students may discuss the inquiry of Jean-Paul Sartre whether there is a God, they should also be permitted to discuss the conviction of Saul of Tarsus, that there is. *See Widmar v. Vincent*, *supra*, 454 U.S. at 277 (Stevens, J., concurring).

Under Supreme Court precedent the Lubbock School District's Board of Trustees must allow student expressions of opinion. The Fifth Circuit decision would require the Board to prohibit student expressions about religion. Such content-based regulation of speech deprives students of their Free Speech rights.

CONCLUSION

Amici curiae respectfully request that the petition of the Lubbock Independent School District be granted to reaffirm governmental neutrality toward religion. *Lubbock* should be reviewed and reversed to assure nondiscriminatory access to public school facilities for voluntary student meetings.

Respectfully submitted,

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